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How can we unleash the agency when it hasn't yet been leashed?

The CIA's Distemper

by Morton H. Halperin

There is newfound sympathy for the Central Intelligence Agency on Capitol Hill these days, promising a receptive audience for President Carter's plea to remove "unwarranted" limits on the CIA's ability to collect intelligence. But there is no urgency because Congress has imposed no such limits. Four years after congressional investigators documented that the CIA and other intelligence agencies had seriously abused the rights of Americans, Congress has done nothing but create committees and charge them with considering legislation. Proposals for intelligence "charters" delimiting the powers of each agency have been pending ever since the scandals broke. Now the intelligence agencies and others have seized the opportunity of the current crisis to press for legislation weakening the democratic limits on intelligence behavior that already exist.

In the jockeying that preceded President Carter's State of the Union message, Vice President Mondale and Senator Walter Huddleston, chairman of the subcommittee on charters of the Senate Intelligence Committee, won the Carter administration's support for comprehensive charters intended to prevent new abuses while giving the intelligence community some of the authority and protection from scrutiny that it seeks. But Senator Daniel Patrick Moynihan has broken ranks among Democrats on the committee and has introduced a package of three amendments amounting to the intelligence community's wish list. Senate Majority Leader Robert Byrd has now endorsed the Moynihan proposals, which would weaken restrictions on covert operations, exempt the CIA almost completely from the Freedom of Information Act, and impose criminal penalties for releasing the names of intelligence agents. These changes have come to symbolize the campaign to "unleash" the CIA. But closer examination of each proposal shows that the problems of the intelligence community lie elsewhere, as do the cures.

Almost from the day he took office President Carter has complained about having to inform seven or eight committees of Congress if he decides to conduct a covert operation. Carter has pressed for confining congressional review to the two intelligence committees, and his aides have suggested in background briefings that this requirement has prevented covert operations that could have a critical effect on the Persian Gulf crisis.

The Hughes-Ryan Amendment, passed in 1974, is the cause of this fuss. It provides that before the CIA

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undertakes any operation not solely for the purpose of gathering information—that is, when it actually tries to meddle in events in other countries—the president must find that the activity is important to the security of the United States, and must notify the "appropriate" committees of the Congress, including the Foreign Relations and Foreign Affairs committees. Critics of this law point out that about 180 senators and representatives sit on the eight committees that have received these briefings at one time or another, and the committees employ about another 180 staff members. These figures are very misleading. One committee, the House Armed Services Committee, has dropped out and is no longer briefed. There is nothing to stop the counterpart committee in the Senate from doing the same thing. Both Appropriations committees also could inform the president that they no longer want the briefings. Indeed, since the intelligence committees have inherited the CIA oversight and budget functions, it would make sense for these committees to withdraw. All of this could be done without amending the law and with nary a complaint from critics of covert operations.

Since even the staunchest CIA unleashers agree that the intelligence committees should know what the agency is up to, the real controversy is about the Senate Foreign Relations Committee and the House Foreign Affairs Committee. It's sensible for these committees to be informed about operations designed to influence events in foreign countries. Both committees have set up subcommittees to get intelligence briefings; they will not talk about precisely how this works, but it appears that in practice only a handful of members and one or two staff people actually learn about covert operations.

The record so far suggests that these few additional people—along with the dozens in the executive branch who get briefed—can be trusted with these secrets. Both the Carter and Ford administrations have engaged in covert operations since Hughes-Ryan went into effect. The committees have been briefed and no leaks have occurred. The Washington press corps has yet to report a single covert operation carried out under the Hughes-Ryan procedures. This is not proof that congressional oversight makes covert operations impossible. It is proof that oversight is possible without leaks. If there have been fewer covert operations in recent years, it might be because the Church Committee documented the difficulties they can cause, because neither the Ford nor the Carter White House has Nixon's taste for overthrowing democratic governments, because the CIA is now run by men less sympathetic to covert operations than Allen Dulles was, or because the forces of nationalism have made such operations much more difficult.

Critics of the Hughes-Ryan restrictions also complain about the need for a presidential finding of security importance before any operation can begin. This, we are told, often makes it impossible to go forward because the president is inaccessible or because the issue is not important enough to bother him. The first objection makes no sense; the president is always instantly available to his national security advisers. The second problem already has been overcome by stretching the Hughes-Ryan language in secret.

The Moynihan bill would permit the president to designate certain categories of covert operations as important to the security of the United States, and permit operations within those categories without specific presidential approval. What Senator Moynihan knows from the briefings he has received as a member of the Senate Intelligence Committee, but what neither he nor anyone else privy to those briefings has chosen to reveal publicly, is that Hughes-Ryan has been interpreted to permit just this procedure. Both President Ford and President Carter made general findings that covert operations for three purposes—apparently counterintelligence, international terror, and international narcotics—were important to the national security. Operations in these areas are conducted routinely without presidential approval or notice to the eight committees.

The real issue of covert operations is not how many committees must be informed, but rather when these operations should be permitted. The Church Committee, following the advice of Cyrus Vance and Clark Clifford, recommended that such operations are justified only in the most extraordinary circumstances, when the survival of the nation might be at stake. National Security Adviser Zbigniew Brzezinski is known to believe that covert operations should be conducted routinely whenever they might advance American interests; Secretary Vance is said to have moved only slightly from the position he advocated before taking office. The Senate Intelligence Committee is pressing for a requirement that it be notified before covert operations begin, rather than afterward, as is now the case. CIA critics want to prevent a return to the days when the White House and the CIA routinely conducted covert operations whenever they wished to escape congressional or public scrutiny. Most critics gladly would reduce the reporting requirement to four or even two committees if the notice came in advance and if Congress legislated a strict standard for conducting such operations.

President Carter also has been eager to amend the Freedom of Information Act in the CIA's favor since the earliest days of his presidency. This proposal is not a product of the current crisis, but it is a red herring. Under the FOIA, as it was amended in 1974, the CIA is free to withhold documents or even to deny that they exist if to do otherwise would reveal information about CIA employees, jeopardize an intelligence source or method, or reveal properly classified information. If forced to defend a denial of information in court the CIA can present arguments to the judge in secret without the opposing lawyer or client present. This standard for release is so high, and federal judges are so

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willing to defer to the expertise of the CIA, that in hundreds of cases involving thousands of pages of information, only once has a federal judge ordered the CIA to release material that the agency, after its own deliberations, has refused to make public. Since that case is on appeal, not a single sentence has been made public without the consent of the CIA.

There have been enormous public benefits from including the CIA under the Freedom of Information Act. Because of the FOIA, the public has learned about the CIA drug testing program, CIA surveillance of Americans, the CIA's interpretation of its authority to conduct covert operations, the directives under which the CIA conducts surveillance of Americans today. All of this information has been released without any harm to the national security.

The FOIA does require the CIA to respond to requests from people it may not like, such as this writer or Philip Agee, and even to answer queries that it suspects emanate from the KGB. But it need not release any information in response to such requests. The FOIA *is* expensive, but that seems a price well worth paying for the public oversight it makes possible. Carefully drawn FOIA amendments to help the CIA weed out requests from hostile intelligence services might be in order. But Moynihan's proposal to exempt all CIA operational files from the search and release procedures of the FOIA (except for requests for personal files), would cause a substantial reduction in the ability of the public to learn about intelligence activities. It is in no way justified by the public record.

There is little controversy about Moynihan's proposal to make it a crime for a present or former official to reveal the names of CIA officials or agents. But there is much debate about the second provision in this part of the Moynihan bill, which would punish the press for revealing the names of agents. The first provision is directed at Philip Agee. Ever since he went abroad and published a book naming everyone he knew who was working with the agency in Latin America, the CIA has longed to get even with its former employee. This bill would not apply retroactively to Agee, but it would punish those who might be tempted to follow in his footsteps. So far, no one has followed Agee's example. Other former CIA agents who have written books have been careful not to reveal names. The second provision in this part of the Moynihan bill is directed at the *Covert Information Bulletin*. This magazine publishes the names of those it believes to be CIA employees in various countries. Agee is connected with this publication, but all of the information it publishes is derived from public sources. This portion of the bill would punish a private citizen who, in the frank summary of Representative Boland, its chief House sponsor, discloses unclassified information obtained from unclassified sources.

In the eyes of most constitutional scholars, every court that has considered the matter in any form, and at least until now the Department of Justice, such a law is almost certainly unconstitutional. This provision would have covered the *Washington Post* when it reported that King Hussein of Jordan was taking money from the CIA. Drafters of the legislation have tried to limit its scope by requiring proof that the intent of the disclosure was to impair or impede an intelligence activity. But under the First Amendment, Americans have every right to seek to "impede or impair" the functions of any federal agency, whether it is the FTC or the CIA, by publishing information acquired from unclassified sources.

The CIA asserts that foreign intelligence services and potential agents have been refusing to cooperate with the agency because of the perception that the agency cannot keep secrets. It is undoubtedly true that the CIA has more trouble now than it had five years ago in persuading people that it can keep secrets. But the reasons for this have little to do with the new legal restrictions. Ten years ago major American newspapers and magazines simply would not publish CIA secrets. Now they seek them out and often are willing to publish even over presidential objections. More than 100 retired CIA officials are writing their memoirs; many others have talked and are talking on background to journalists writing books about the CIA. The Kampiles and Boyce spy scandals have revealed that even if the CIA is free of moles, its secrets can reach foreign governments through the treachery of clerks and junior officials. The Supreme Court has established the right of citizens to sue executive branch officials who violate their constitutional rights. Suits brought against the CIA have led to the release of many documents; amendments to the FOIA would not affect this right of discovery in a civil suit. The CIA also is no longer able to squelch indictments of its officials or agents who commit crimes. In such cases much information is released. So even if the CIA had its wishes fulfilled, and Congress exempted it from the FOIA and passed the names of agents bill, the agency still would not be able to assure potential collaborators that information would not be made public by the courts, Congress, or the press.

To attribute the intelligence failures of the past few years to attacks on the CIA by civil libertarians is to ignore the fact that such failures were occurring long before champions of civil liberties or anyone else was taking a close look at the CIA. The CIA was established to overcome the problems that produced the Pearl Harbor intelligence failure. Throughout its history, it has had successes and failures. Even in the 1950s and early 1960s when it operated with full authority to keep its secrets, when it reported to no congressional committees, and when there was no FOIA, the CIA often failed. The Bay of Pigs is only one of the many examples. Undoing recent efforts to put limits on the intelligence community's power to spy on Americans and to intervene abroad will do little to improve intelligence gathering.